

1708204 (Migration) [2018] AATA 5009 (19 October 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1708204
MEMBER:	Hugh Sanderson
DATE:	19 October 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Statement made on 19 October 2018 at 11:19am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Partner (Provisional) (Class UF) visa – sponsorship limitation – limited information regarding previous marriages – compelling circumstances – able to relocate to China – adequate medical support in China – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 65, 359AA

Migration Regulations 1994 (Cth) r 1.20J Schedule 2 cls 309.213, 309.222

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 16 March 2017 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 20 March 2016 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.222 because the sponsorship was not approved by the Minister. The reason for this was that the sponsor did not meet the requirements in r.1.20J and the delegate was not satisfied that there were compelling circumstances affecting the sponsor so that the sponsorship should be approved.

Background

4. The first named visa applicant (the visa applicant) is a citizen of China and is currently [age] years old. He was previously married and divorced his wife in 2005. There are two children of that relationship, the second of whom is the second named visa applicant and is currently [age] years old. The visa applicant entered Australia on [date] March 2008 holding a [temporary] visa. That visa expired and he remained in Australia. He was granted a Bridging visa while another application was assessed. That application was refused and the visa applicant remained in Australia as an unlawful non-citizen. He was located by the Department and placed in immigration detention. He was returned to China on [date] April 2015.
5. The review applicant was born in China and is currently [age] years old. She is an Australian citizen. She first entered Australia in December 1991 sponsored by her then husband, [Mr A]. There is a child of that relationship, [Mr B], who is currently [age] years old and resides in Australia.
6. The review applicant divorced her first husband in 1998. In 2004 she married [Mr C] who she sponsored for a Partner visa which was granted to him. She divorced [Mr C] in August 2010. There were no children of that relationship.
7. The review applicant then married [Mr D] in December 2010 who she sponsored for a Partner visa which was granted to him. She divorced [Mr D] in July 2015.
8. The parties claimed that they met each other on 20 December 2014 while the visa applicant was in Australia. The parties claimed that they committed to a relationship with each other on 14 February 2015. The visa applicant then returned to China in April 2015. The review applicant travelled to China for two weeks in September 2015 and again for a month in December 2015. The parties were married in China on 30 December 2015.
9. Since then, the review applicant has travelled overseas as follows:

- From 28 April 2016 to 13 May 2016;
 - From 22 December 2016 to 12 January 2017;
 - From 21 December 2017 to 16 January 2018; and
 - From 28 March 2018 to 6 April 2018.
10. The review applicant provided details from her doctor who stated that she was suffering from severe heart disease and had been advised not to go overseas or take aeroplane travel.
 11. The Department noted that as the review applicant had previously been the sponsor of two visa applications she was subject to a sponsorship limitation pursuant to r.1.20J(1). The review applicant was invited to provide compelling circumstances affecting her for a reason to approve the sponsorship. An officer from the Department contacted the review applicant by telephone and interviewed her.
 12. The delegate who considered the application noted the following issues:
 - The review applicant had provided letters from her doctors in 2015 as to her medical condition, but any medical condition she suffers from has not stopped her from travelling or working;
 - When interviewed, the review applicant was at work and stated that she worked part-time in a factory and that her health situation was monitored by consulting with her GP and treating cardiologist;
 - The review applicant has been able to travel overseas on a number of occasions since 2016;
 - There is no information that the review applicant would suffer any significant hardship if she decided to depart Australia to maintain her claimed relationship with the visa applicant in China; and
 - No information had been provided that the failure of her first two marriages for people she sponsored for Partner visas would provide a reason to waive the sponsorship bar.
 13. Taking into account the above information, the delegate was not satisfied that the review applicant's circumstances were compelling to the degree necessary to exercise the waiver in r.1.20J. As the sponsorship limitation was not waived the applicant was not the subject of an approved nomination and therefore did not meet the criteria in cl.309.222. Accordingly the application was refused. As the application of the second named visa applicant was based on the fact that he was a member of the family unit of the first named visa applicant and as the first named visa applicant did not meet the criteria for the grant of the visa, the application of the second named visa applicant was also refused.

Information to the Tribunal

14. The review applicant provided further documents to the Tribunal including the following:
 - Correspondence from hospitals and other medical providers in relation to her treatment in 2015;

- Statement of the review applicant and other documents from 2015 in relation to the start of the review applicant's relationship with the visa applicant;
 - Telephone records;
 - Photos of the parties together in China;
 - Letters from [Dr E], cardiologist, noting the review applicant's medical condition and claiming that extra help at home from her husband would be beneficial to her;
 - The review applicant's health records from her general practitioner;
 - Letter from[a], psychologist dated 14 September 2018;
 - Statutory Declarations from friends of the review applicant; and
 - Statutory Declaration from the review applicant's third husband, [Mr D], claiming that their marriage deteriorated after June 2012 when the review applicant started having medical problems and they started living separately and apart in March 2013, two months after he had been granted the right to reside permanently in Australia.
15. The review applicant appeared before the Tribunal on 25 September 2018 to give evidence and present arguments. The Tribunal also received oral evidence from three friends of the review applicant. The review applicant was represented in relation to the review by her registered migration agent who attended the hearing.
 16. The review applicant gave evidence as to her current circumstances including where she is living, her work and the details of the visa applicant's son, [name deleted](the second named visa applicant). She said that [the second named applicant] had not been studying since before May 2018 but is not doing anything else. She could not remember what he had been studying. She said that she pays for everything in her household.
 17. The review applicant provided details of the visa applicant's life. She said that he had no problems living in China but that after he arrived in Australia he liked it so wanted to stay. She was aware that he applied for a Protection visa, but did not know what basis he applied for that visa. She confirmed that after returning to China he has not had any difficulties with the Chinese authorities for any reason.
 18. The review applicant said that the last time she had been admitted to hospital was in 2017. She said that she was admitted for a few hours as she was suffering from shortness of breath. She claimed that this was due to a relapse of her cardio condition.
 19. The Tribunal referred to the process under s.359AA of the Act. The Tribunal advised the review applicant that it would be putting to her information which would be the reason, or a part of the reason, for affirming the decision under review. It would explain why this information was relevant and then invite the review applicant to comment on or respond to the information. If she required more time to comment on or respond to the information she could request an adjournment.
 20. The Tribunal referred to the fact that as she was born in China she could renounce her Australian citizenship and return to live in China permanently as a Chinese citizen with access to Chinese health services with the visa applicant if she should so choose to do so. The review applicant said that she is an Australian citizen and does not want to return to live in China. She said that she suffers from a serious heart problem and cannot live there.

21. Friends of the review applicant gave evidence in support of the application. They claimed that the parties were in a genuine relationship. They said that the review applicant was suffering from depression due to her separation from the visa applicant.
22. The review applicant was given until 14 October 2018 to provide further information, including a report from her cardiologist and her most recent admission to hospital. The review applicant provided the discharge summary from [a] Hospital. This stated that she had been admitted after the hearing on 30 September 2018 and discharged on 6 October 2018. It stated the review applicant presented to the facility with “respiratory – shortness of breath”. The final diagnosis given was that she suffered from nocturnal dizziness with chest discomfort of unclear etymology. Blood tests were carried out which were not commented on. A chest x-ray was reported to be “unremarkable”.
23. The review applicant provided a letter dated 11 October 2018 from her treating cardiologist, [Dr E] stating that he had been treating her for mitral valve disease and atrial fibrillation for three years and passed the opinion that she was too ill to travel overseas. This was similar to the reports [Dr E] had provided to the review applicant since 2015.
24. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

25. The issue in the present case is whether there are compelling circumstances affecting the sponsor (the review applicant) such that the sponsorship should be approved.

Are the sponsorship requirements met?

26. Clause 309.213 requires that the visa applicant is sponsored by the review applicant, where such person has turned 18; or where they have not, by the review applicant’s parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in r.1.03 of the Regulations).
27. At the time of decision, this sponsorship must have been approved and still be in force. Approval of sponsorship is subject to limitations contained in r.1.20J of the Regulations which sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship.
28. It is not disputed that the review applicant does not meet the sponsorship requirements in r.1.20J(1). The review applicant has previously sponsored two visa applicants for the grant of Partner visas. It is claimed that shortly after those visa applicants were granted the right to reside permanently in Australia the review applicant’s relationship with them ended and she subsequently divorced those husbands. As the review applicant has previously sponsored more than one other person for the grant of a Partner visa she does not meet the requirements of r.1.20J(1) and, if the sponsorship is to be approved the Tribunal must be satisfied that there are compelling circumstances affecting the sponsor.
29. The Tribunal has not, for the purposes of this decision, made a full assessment of whether the parties are in a genuine and continuing relationship. It is a requirement for the grant of the visa that the parties be in a genuine and continuing relationship. As the sponsorship requirements are in addition to the parties meeting this criteria, the mere fact that the parties may be in an exclusive and genuine and continuing relationship of itself does not provide compelling circumstances affecting the sponsor for approval of the sponsorship, otherwise the sponsorship limitation is meaningless. The Tribunal has, however, taken into account all the particular circumstances of the claimed relationship.

30. The parties claimed that they only first met each other on 20 December 2014 and commenced a relationship on 14 February 2015. The visa applicant, at that time, was placed in immigration detention as he was an unlawful non-citizen and the parties had little time together. He then left Australia in April 2015. Although the review applicant has travelled to China to spend time with the visa applicant, the actual time the parties have physically spent together in any domestic relationship has been very limited.
31. Various statements have been provided by witnesses claiming the relationship is genuine, and the review applicant was supported by a number of witnesses at the hearing. The information, however, does not indicate that there are any characteristics of the relationship that would indicate that the relationship is anything other than would be expected in a genuine relationship. The Tribunal is not satisfied, taking into account all the aspects of the relationship, that it provides a compelling circumstance affecting the sponsor so that the sponsorship should be approved.
32. The review applicant has been diagnosed as suffering from mitral valve disease. The reports from her cardiologist, which date from 12 December 2015, all state that she has been advised to avoid travelling outside Australia for prolonged periods and would benefit from somebody staying with her. There is no information that she has not been able to manage her condition throughout the time that she has been living in Australia or that her condition has deteriorated in any way. The review applicant has access to appropriate medical facilities in Australia and is able to continue to have access to them.
33. The review applicant has returned to China on a number of occasions since December 2015. There is nothing to indicate that during her time in China she faced any medical problems or had any difficulties due to her condition. As the review applicant was born in China, if she decided to return to China permanently she would be able to regain Chinese citizenship and have access to the medical support afforded to all Chinese citizens. The Tribunal has taken into account the media reports provided by the review applicant as to medical treatment in China and the distance she may need to travel to get medical treatment. If the review applicant did decide to return to China to live, there is nothing to stop her moving closer to where medical facilities are available if that is a concern. The Tribunal does not accept that the medical facilities provided to Chinese citizens are inadequate based on the report provided by the review applicant.
34. The Tribunal is not satisfied that any aspect of the medical condition suffered by the review applicant provides a compelling circumstance affecting the review applicant such that the sponsorship should be approved.
35. The review applicant has provided a report from [a]psychologist, stating that she has received 17 sessions over the last three years and suffers from anxiety and depression. It is noted that "she is sad that she has two failed marriages". In actual fact, the review applicant has had three failed marriages being her first marriage to her then husband who sponsored her for a Partner visa to reside in Australia and the two husbands who she sponsored for Partner visas to reside in Australia. There is no information that she is required to take any medication for any anxiety and depression she may suffer from and her condition has been appropriately managed by the counselling she receives.
36. The review applicant attended the hearing with a number of friends to support her application. It is clear that the review applicant has an extensive network of friends who she is able to rely upon for support. Her son also continues to live in Australia. There is nothing to indicate that the review applicant would not continue to obtain emotional support from her son and friends in Australia.

37. The Tribunal is not satisfied that any anxiety or depression that the review applicant may suffer provides a compelling circumstance affecting the review applicant such that the sponsorship should be approved.
38. The Tribunal has taken into account the circumstances leading to the end of the relationships of the people who the review applicant sponsored for Partner visas. The statement from her third husband claims that he ended the relationship because he did not accept the medical conditions suffered by the review applicant and the way that it affected her mood and other aspects of their relationship. He ended the relationship soon after being granted the right to reside permanently in Australia.
39. Although the review applicant's third husband was now claiming the sole responsibility for ending their relationship, the Tribunal is not satisfied that the circumstances of the ending of those relationships, even if the review applicant were totally blameless, provide compelling circumstances affecting the sponsor such that the sponsorship should be approved. The fact that the review applicant's three previous marriages came to an end may indicate a lack of proper assessment by the review applicant of the person she is agreeing to marry. There are many factors which lead to parties deciding to end their relationship and it is impossible to simply claim that the reason the review applicant's three previous relationships came to an end were not due in part to any reason attributable to the review applicant. The Tribunal is not satisfied that the circumstances why the review applicant's previous marriages, and in particular her last two marriages, provide a compelling circumstance affecting the review applicant such that the sponsorship should be approved.
40. The Tribunal has considered all the circumstances affecting the sponsor both individually and cumulatively. The Tribunal is not satisfied that when considered together the review applicant's circumstances provide compelling circumstances affecting the review applicant such that the sponsorship should be approved.
41. Accordingly, the Tribunal finds that the sponsorship requirements in r.1.20J are not met. As the sponsorship is not approved, the requirements of cl.309.222 are not met.
42. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

43. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Hugh Sanderson
Member